IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
VANCE COLE CHESNUT,	§	
Debtor.	§	
	§	CASE NO. 4-03-41050-DML-13

VANCE COLE CHESNUT,	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
MARK T. BROWN AND TEMPLETON	§	
MORTGAGE CORPORATION	§	
Defendants.	§	ADV. NO. 03-4248-DML-13

Memorandum Order

Before the court is Defendants' Motion for New Trial or to Alter or Amend Judgment, Pursuant to Bankruptcy Rule 9023 and Rule 59 of the Federal Rules of Civil Procedure (the "Motion"). In the Motion Defendants ask that the court vacate its judgment entered in this cause on December 24, 2003 (the "Judgment"). The Judgment was entered pursuant to this court's findings and conclusions embodied in its opinion in *Chesnut v. Brown (In re Chesnut)*, 300 B.R. 880 (Bankr. N.D. Tex. 2003) ("*Chesnut I*").

In *Chesnut I* the court concluded that Defendants violated the automatic stay of section 362 of the Bankruptcy Code by foreclosing after debtor's chapter 13 filing on property held in the

name of the debtor's non-debtor spouse despite notice that debtor claimed a community interest in the property. As the basis of the Motion, Defendants cite the court to *McCloy v. Silverthorne* (*In re McCloy*), 296 F.3d 370 (5th Cir. 2002).

In *McCloy* Mr. McCloy acquired property in his name with community funds. McCloy later granted Silverthorne a lien on the property. Two years later, at a time when Mrs. McCloy was a debtor under chapter 12 of the Bankruptcy Code, McCloy granted Silverthorne a new lien which replaced the prior lien. At the time of the granting of each lien, Silverthorne was unaware of Mrs. McCloy's claimed interest in the property. Silverthorne also was unaware of Mrs. McCloy's chapter 12 bankruptcy until long after receipt of the second lien. Silverthorne foreclosed on the property in October 1997,[1] apparently still having been given no notice that Mrs. McCloy claimed the property was community property.

Mr. McCloy independently commenced an action to void Silverthorne's foreclosure in 1997. At the time Mr. McCloy's bankruptcy was filed, Mrs. McCloy sought to intervene in that suit. *See In re McCloy*, U.S. Dist. LEXIS 16805, at *3. It was at this point that Mrs. McCloy first gave notice that the property was community in character.

The bankruptcy court found that the property was under Mr. McCloy's management and control and thus was Mr. McCloy's sole management community property. That conclusion was approved by the District Court and the Court of Appeals.

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[1] Mrs. McCloy filed her chapter 12 case on June 1, 1992, shortly after the grant of the first lien. *In re McCloy*, 296 F.3d at 371. Mrs. McCloy received her chapter 12 discharge in March 1997. *See McCloy v. Silverthorne (In re McCloy)*, No. 2:01-CV-215, 2001 U.S. Dist. LEXIS 16805, at *3 (N.D. Tex. Oct. 16, 2001). Thus, Silverthorne's October 1997 foreclosure on the property did not occur during either Mrs. McCloy's earlier bankruptcy or Mr. McCloy's bankruptcy filed in December 1998.

In determining Silverthorne could rely on the property being only in Mr. McCloy's name in taking his liens, the Court of Appeals pointed to Texas Family Code section 3.104(b), which creates a presumption that property held in a spouse's name is presumed to be subject to that spouse's sole-management and control. *In re McCloy*, 296 F.3d at 373. However, whether or not the property was in fact sole-management community property or community property which was subject to Mrs. McCloy's ownership interest was dealt with by the bankruptcy court as a question of fact, a determination seconded upon *de novo* review by the District Court, and held fully supported by the evidence by the Court of Appeals. *Id.* at 373-74.

This court was fully aware of the *presumption* created by section 3.104(b) of the Texas Family Code. *See Chestnut I*, 300 B.R. at 884. However, section 3.104(b) simply creates a *presumption* upon which a party may rely and is dependent on that party having no "actual or constructive notice" of the other spouse's interest.[2]

Unlike Silverthorne, Defendants (as they admit, Motion, ¶ 7) knew that debtor Chesnut claimed an interest in the property in question and had filed chapter 13. This court did not in *Chesnut I* determine the character of ownership of the property. *Id.* at 886. It did not question the validity of Defendants' lien. *Id.* at 883, 890. Rather, the court determined that an issue of fact existed as to whether or not the property was community property and that it was not up to Defendants, who were aware of the factual dispute, to foreclose on property which might, depending on how the facts were determined, be property of the estate. *Id.* at 886-87. This determination is entirely consistent with the decision of the Court of Appeals in *In re McCloy*.

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[2] TEX. FAM. CODE ANN. § 3.104(b)(2)(B) (2004).

In *In re McCloy* the fact issue of ownership of the property was raised before and decided by the court. To the extent Silverthorne acted without a prior factual determination by a court of Mrs. McCloy's rights, he did so without notice of Mrs. McCloy's purported interest in the property and/or when the property was not subject to a bankruptcy stay. In the case at bar, Defendants were on notice that their ability to act turned on a *presumption*. A presumption is subject to being overcome. *See* FED. R. EVID. 302; *Chesnut I*, 300 B.R. at 886 (citing *Teas v. Republic Nat'l Bank*, 460 S.W.2d 233, 243 (Tex. App.–Dallas 1970, writ ref'd n.r.e.)).

Once on notice that the presumption of sole-management is subject to challenge, even absent a bankruptcy case, a party must obtain a determination of ownership from a court or proceed at its own risk. Where, as here, a bankruptcy estate and the automatic stay are implicated, as Defendants knew, the option of proceeding without court approval is effectively unavailable.

For the reasons given, the court concludes the Fifth Circuit's decision in *In re McCloy* has no bearing on the question of whether Defendants, on notice, violated the automatic stay. The Motion is therefore DENIED.

It is so ORDERED.

Signed this the 13th day of January 2004.

DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE